



In the Matter of:

MICHAEL JOHNSON,

ARB CASE NO. 2020-0037

COMPLAINANT,

ALJ CASE NO. 2019-STA-00022

v.

DATE: January 29, 2021

NORFLEET TRANSPORTATION,

RESPONDENT.

Appearances:

For the Complainant:

Michael Johnson; *pro se*; Indianapolis, Indiana

For the Respondent:

Brian D. Walters, Esq. and Justin R. Wilmers, Esq.; *Poole Shaffery & Koegle, LLP*; Santa Clarita, California

Before: James D. McGinley, *Chief Administrative Appeals Judge*; James A. Haynes and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. Michael Johnson (Complainant) filed a complaint under the Surface Transportation Assistance Act of 1982¹ (STAA), as amended, and its implementing regulations,² alleging that his former employer, Norfleet Transportation, Inc. (Respondent), had violated the STAA's whistleblower protection provisions by terminating his employment. After a hearing, an Administrative Law Judge (ALJ) found that Respondent had not violated the STAA and denied the claim. Complainant appealed the ALJ's decision. We affirm.

¹ 49 U.S.C. § 31105 (2007).

² 29 C.F.R. Part 1978 (2020).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated his authority to the Administrative Review Board to issue agency decisions in STAA cases.³ The Board reviews an ALJ's factual determinations under the substantial evidence standard.⁴ The Board reviews the ALJ's legal conclusions de novo.⁵

BACKGROUND

On December 31, 2015, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent, a commercial transportation company, terminated his employment as a truck driver in violation of the whistleblower protection provisions of the STAA, 49 U.S.C. § 31105.⁶ OSHA conducted an investigation of the complaint, which concluded on November 19, 2018, and Complainant requested a hearing before the Office of Administrative Law Judges on January 29, 2019.⁷

On January 7, 2020, an ALJ conducted a formal hearing, during which Respondent's CEO, Leonard Jackson, and Complainant both testified and presented evidence, including several exhibits and pre-hearing statements filed by each party.⁸

On October 22, 2015, the parties entered into an employment contract titled "Independent Contractor Operating Agreement" for Complainant to use his 2006 Peterbilt 387 tractor to transport loads dispatched to him by Respondent.⁹

On November 29, 2015, Respondent dispatched Complainant to pull a trailer from Plymouth, Indiana to Tyner, North Carolina.¹⁰ During the trip, somewhere north of Lexington, Kentucky, a steer tire on Complainant's tractor suffered a

³ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

⁴ 29 C.F.R. § 1978.110(b).

⁵ *Olson v. Hi-Valley Constr. Co.*, ARB No. 2003-0049, ALJ No. 2002-STA-00012, slip op. at 2 (ARB May 28, 2004) (citations omitted).

⁶ Decision and Order (D. & O) at 1.

⁷ *Id.*

⁸ *Id.* at 1, 7.

⁹ D. & O. at 4; Complainant's Exhibit (CX) 1.

¹⁰ D. & O. at 4.

puncture, and Complainant discovered that a tire on the trailer was also flat.¹¹ Complainant notified Respondent's dispatchers of the issue. Complainant asserts the dispatchers informed him that he did not have the option to rest before proceeding on his trip.¹² The tires were repaired within a few hours.¹³ An exhibit entered as evidence provides text messages between Complainant and Respondent's dispatcher, in which they discuss the arrangements for replacing the tires.¹⁴

Complainant testified that he was "shaken up" after nearly losing control of the truck when the steer tire was punctured, and he informed Jackson that he did not feel safe continuing the trip.¹⁵ Complainant claimed that Jackson told him, "You have to continue driving because this load has to be delivered tomorrow morning." Jackson denied the claim and testified that he never told a driver to "drive unsafe."¹⁶

Complainant initially testified that he refused to drive after the repairs.¹⁷ However, Complainant subsequently testified that he drove an additional four to five hours before shutting down the tractor in Fort Chiswell, Virginia.¹⁸ Additionally, in his pre-hearing statement, Complainant stated, "In fear of losing the contract [he] had just gained, Complainant reluctantly continued to drive approximately 5 hours and 30 minutes (almost exhausting his 14 hour clock) until Complainant arrived on November 30, 2015 at approximately 1:45am . . . in Fort Chiswell, Virginia."¹⁹ The Complainant never claimed in his statement that he had refused to drive on November 29.

Complainant further testified that on November 30, 2015, Jackson instructed him to resume his trip before the conclusion of his mandatory rest period. Complainant also testified he had informed Jackson at the time that he could not drive until the end of the rest period.²⁰ Jackson denied having this conversation

¹¹ D. & O. at 4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*; CX 2.

¹⁵ D. & O. at 4.

¹⁶ *Id.*

¹⁷ After the ALJ asked him if he "continue[d] to drive," Complainant answered, "No, I refused to drive. I didn't feel safe." D. & O. at 5.

¹⁸ D. & O. at 5.

¹⁹ D. & O. at 6; CX 4.

²⁰ D. & O. at 6.

with Complainant. Moreover, Jackson also clarified that he had never instructed any driver to drive outside of his or her legal drive time.²¹

After Complainant continued his trip on November 30, the drive shaft on the tractor fell out, rendering the vehicle inoperable.²² Respondent then dispatched another tractor to complete the trip.²³ Complainant did not subsequently repair his tractor or drive it again. Respondent later terminated Complainant's employment contract.²⁴ The parties' work relationship lasted 39 days, and Respondent did not pay Complainant for the partial trip.²⁵

On February 20, 2020, the ALJ entered a Decision and Order denying the claim.²⁶ In the decision, the ALJ discussed his assessment of Complainant's credibility from his testimony, emphasizing the importance of the consistency of a witness's entire testimony and its consistency with the other evidence in the record.²⁷ The ALJ noted that Complainant's pre-hearing statement made no claim that he had refused to drive on November 29, and indicated that he had driven for several more hours after the repair.²⁸ The ALJ further observed that the text messages between Complainant and Respondent's dispatcher from the night of November 29 contained no suggestion that an employee of Respondent had instructed Complainant to keep driving in spite of safety concerns.²⁹ The ALJ also compared an email sent by Complainant to Respondent on December 10, 2015, in which Complainant expressed his overall dissatisfaction with the trip but never suggested that Respondent had improperly directed him to resume driving on November 29 or 30.³⁰

ALJ DECISION

The ALJ issued a decision in which he concluded that Complainant had not proven by preponderance of the evidence that he had refused to drive on November 29 or 30, 2015, and, therefore, Complainant had not proven that he had engaged in

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 6, 10.

²⁵ *Id.* at 6-7.

²⁶ *Id.* at 1, 11.

²⁷ *Id.* at 7-8.

²⁸ *Id.* at 7.

²⁹ D. & O. 7-8; CX 2.

³⁰ D. & O. 8; CX 3.

protected activity under the STAA.³¹ The ALJ cited Complainant's contradictory testimony (noted above), and the lack of evidence to support Complainant's allegation. Significantly, the ALJ specifically found that Complainant had driven to Fort Chiswell after the tires were replaced.³²

The ALJ then discussed whether Respondent had taken an adverse employment action against Complainant.³³ The ALJ determined that there was no evidence Respondent had unfairly disciplined or discriminated against Complainant during their employment relationship. He further determined there was no evidence that Respondent did anything to bring the work relationship between the parties to an end. The ALJ found the employment relationship ended because Complainant no longer had an operable tractor (which was required under the Independent Contractor Operating Agreement).³⁴ The ALJ also found there was no evidence that Respondent was motivated by any improper purpose when it ended the work relationship with Complainant. The ALJ therefore concluded that Complainant had failed to prove by preponderance of the evidence that he suffered an adverse employment action under STAA and denied the claim.³⁵

Complainant timely filed his petition for review of the ALJ's decision.³⁶

DISCUSSION

The STAA whistleblower statute provides that an employer may not discharge or otherwise retaliate against an employee for refusing to operate a vehicle because; (a) the operation is unlawful or (b) the employee has a reasonable apprehension of serious injury because of the vehicle's condition.³⁷ To prevail on a STAA complaint, the complainant must prove by a preponderance of the evidence³⁸ that (1) he or she engaged in a protected activity, (2) that the employer took an adverse employment action against them, and (3) that the protected activity was a

³¹ D. & O. at 8-9. The ALJ noted that Complainant did not describe any other acts of alleged protected activity. D. & O. at 9.

³² D. & O. at 8-9.

³³ *Id.* at 9-10.

³⁴ *Id.* at 10.

³⁵ *Id.* at 10-11.

³⁶ Complainant's Petition for Review.

³⁷ 49 U.S.C. § 31105(a) (1) (B).

³⁸ Preponderance of the evidence requires that the complainant show that their allegation is more likely true than not. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (this standard "requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence'").

contributing factor to the adverse employment action.³⁹ If the complainant is unable to prove all three elements, the entire complaint fails.⁴⁰ If the complainant successfully meets this burden, the employer may avoid liability by demonstrating by clear and convincing evidence⁴¹ that it would have taken the same adverse action in the absence of the protected activity.⁴²

In STAA whistleblower cases, the Board will consider an ALJ's factual findings conclusive if supported by substantial evidence on the record considered as a whole.⁴³ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁴⁴

Complainant argues that the ALJ erred in finding that he failed to prove by preponderance of the evidence that he had engaged in the protected activity of refusing to drive, and that Respondent had taken an adverse employment action against him.⁴⁵ Complainant contends that the ALJ made an erroneous credibility determination in crediting Jackson's testimony over his.⁴⁶

³⁹ 29 C.F.R. § 1978.109(a); *Estate of Ayres*, ARB Nos. 2018-0006, -0074, ALJ No. 2015-STA-00022, slip op. at 6 (ARB Nov. 18, 2020). Refusing to drive because of safety concerns or because the operation of the vehicle would be unlawful is a protected activity. *Id.* *But see Poulter v. Central Cal Transp., LLC*, ARB No. 2018-0056, ALJ No. 2017-STA-00017 (ARB Aug. 18, 2020). Refusal to drive as protected activity does not include a refusal to take reasonable steps to render a cargo load safe to drive.

⁴⁰ *Coryell v. Arkansas Energy Servs., LLC*, ARB No. 2012-0033, ALJ No. 2010-STA-00042, slip op. at 4 (ARB Apr. 25, 2013) (citation omitted).

⁴¹ Under the clear and convincing burden of proof, the employer must demonstrate that it is "highly probable" that the employer would have taken the same adverse action in the absence of the protected activity. *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 52-53, 57 (ARB Sept. 30, 2016) (reissued with full dissent Jan. 4, 2017) (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (citation omitted)).

⁴² 29 C.F.R. § 1978.109(b); *Blackie v. Smith Transp., Inc.*, ARB No. 2011-0054, ALJ No. 2009-STA-00043, slip op. at 8 (ARB Nov. 29, 2012).

⁴³ 29 C.F.R. § 1978.110(b).

⁴⁴ *Menter v. North Cty. Transp.*, ARB No. 2005-0104, ALJ No. 2004-STA-00061, slip op. at 1-2 (ARB Oct. 24, 2007). This standard of "evidentiary sufficiency is not high." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019).

⁴⁵ Complainant's Brief (Comp. Br.) at 4.

⁴⁶ Comp. Br. 4-5.

The Board will not disturb and ALJ's credibility determination unless it is "inherently incredible or patently unreasonable."⁴⁷ Based on our review of the record, we find no reason to overturn the ALJ's credibility findings.

In examining the contemporaneous correspondence between the parties and Complainant's pre-hearing statement, the ALJ pointed out that Complainant never stated that he had refused to drive, or that Jackson had improperly ordered him to continue his trip on November 29 or 30. This earlier evidence directly conflicts with Complainant's testimony that he had refused to drive on those dates. Further, Complainant's testimony was inconsistent because he initially testified that he had refused to drive on November 29, but later stated that he had driven an additional four to five hours after the repairs before shutting down in Fort Chiswell. In contrast, Jackson consistently testified that he had not ordered Complainant to continue his trip after the repairs were completed or before the end of his rest period. Except for the Complainant's inconsistent testimony, there is no evidence in the record that conflicts with Jackson's testimony. Nor does Complainant provide any persuasive reason why the Board should accept his testimony over Jackson's, especially because the ALJ heard Complainant's testimony and did not find it credible. Accordingly, we reject Complainant's argument that the ALJ made an erroneous credibility determination in crediting Jackson's testimony over his.

Based on the ALJ's credibility finding and the evidence in the record as a whole, we conclude the ALJ's finding that Complainant failed to prove he had engaged in a protected activity is supported by substantial evidence in the record.⁴⁸ The ALJ, therefore, correctly denied the claim as a matter of law.

Although we affirm the ALJ's decision, it is necessary for us to make clear that we do not uphold the ALJ's finding that Complainant did not prove he had suffered an adverse employment action under STAA. An employee is subjected to an

⁴⁷ *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB May 9, 2019); accord *Formella v. U.S. Dep't of Labor*, 628 F.3d 381, 391 (7th Cir. 2010) ("[T]he resolution of [a credibility contest] belongs in all but the extraordinary case to the judge who heard and observed the witnesses first hand.").

⁴⁸ We further note the ALJ could not have reasonably concluded that Complainant had engaged in the protected activity of refusing to drive in that instance because the evidence clearly demonstrates that Complainant had continued to drive after the repairs on November 29. Under the STAA, an employee must have refused to operate the vehicle to qualify for protection. *Zurenda v. J&K Plumbing & Heating Co. Inc.*, ARB No. 1998-0088, ALJ No. 1997-STA-00016, slip op. at 5 (ARB June 12, 1998). Therefore, a complainant that drove their vehicle under protest or after voicing concerns about the safety of a vehicle did not "refuse to drive" under the STAA. *Calhoun v. U.S. Dep't of Labor*, 576 F.3d 201, 209 (4th Cir. 2009).

adverse employment action when he or she is terminated from employment.⁴⁹ Here, Respondent ended its work relationship with Complainant after his tractor became inoperable, and under the terms of the Independent Contractor Operating Agreement, which, at a minimum, required Complainant to have an operating tractor.⁵⁰ That is an adverse employment action. Although the ALJ found there was no evidence that Respondent had terminated Complainant's employment for an improper reason, such a finding relates to whether an employee's activity was a contributing factor to the adverse employment action.⁵¹ Nevertheless, the ALJ's denial of the claim is still proper because Complainant failed to prove by a preponderance of the evidence that he had engaged in a protected activity.

CONCLUSION

We conclude the ALJ's finding that Complainant failed to prove by a preponderance of evidence that he engaged in protected activity under the STAA is supported by substantial evidence. Therefore, we **AFFIRM** the ALJ's order denying the claim.

SO ORDERED.

⁴⁹ See 49 U.S.C. § 31105(a) (1) (B) ("A person may not *discharge* an employee . . . because . . . the employee refuses to operate a vehicle.") (emphasis added); see also *R & B Transp., LLC v. U.S. Dep't of Labor, Admin. Review Bd.*, 618 F.3d 37, 46 (1st Cir. 2010).

⁵⁰ D. & O. 10.

⁵¹ *Id.*